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No. 86-1548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

First Officer Larry W. Morrison was discharged by Northwest Airlines for serving as co-pilot on a passenger jet while under the influence of alcohol. A System Board established pursuant to the Railway Labor Act mitigated the penalty to a suspension, with reinstatement explicitly made dependent upon Mr. Morrison's unconditional requalification to return to duty by the Federal Aviation Administration. The Board expressly based its award on the totality of facts and circumstances, including findings that Mr. Morrison's misconduct was caused by alcoholism for which he was subsequently treated and that he has been successfully rehabilitated as evidenced by a consistent pattern of recovery over an extended period of time.

1. Whether the Federal Aviation Act deprived the System Board of jurisdiction to overturn the carrier's determination that Mr. Morrison must be discharged?

2. Whether in any event the System Board's award is contrary to public policy and, therefore, judicially unenforceable?

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BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

STATEMENT

1. Morrison's Discharge

On August 6, 1982, First Officer Larry W. Morrison was discharged by Northwest Airlines, Inc. ("Northwest") for violating the Company's rules prohibiting the consumption of alcoholic beverages within 24 hours of flight duty and for being under the influence of alcohol during a flight on which he served as a crew member. (Pet. App. 3a-4a, 53a-54a) Until then, Mr. Morrison had been a pilot with Northwest

for sixteen years with an unblemished disciplinary record. (Pet. App. 3a, 50a)

The circumstances that resulted in Mr. Morrison's dismissal were that he had been drinking during a thirty-hour stopover in Las Vegas and became ill several hours before his next scheduled flight. (Pet. App. 3a, 50a-51a) Although he asked to be replaced on the flight, no replacement was available, and he was told that the flight would have to be cancelled if he could not fly. Hence, he agreed to perform his duties as co-pilot for the first two legs of the flight, with the understanding that a substitute would be found for the final leg. (Pet. App. 3a, 51a) The flight proceeded to its first stop at San Francisco without incident. To the Captain (pilot-in-command), Mr. Morrison's appearance was "perfectly normal" and he did "an excellent job." (Pet. App. 51a) Nevertheless, alerted by a station agent in Las Vegas whose suspicions were triggered because Morrison was late for crew pick-up, did not "look very well," and was chewing tobacco early in the morning,[1] Northwest officials in San Francisco ordered Morrison to submit to a blood test. The test showed Morrison to have a blood alcohol level of .13%.[2]

At a subsequent investigation conducted by Northwest, Mr. Morrison described a history of "drinking

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[1] In fact, Morrison, who had a farming and ranching background, "chewed tobacco almost constantly." (Pet. App. 52a, n.2)

[2] FAA regulations prohibit any person from serving as a crew member with a blood alcohol level of .04% or more. 14 C.F.R. § 91.11(a)(4) (1986). State law in California establishes a presumption of intoxication with respect to a person with a blood alcohol content of .10% or more. (Pet. App. 3a-4a, 54a).

straight from the bottle for some 10 years," to the point where his tolerance for alcohol had become so great "that if he had drunk a pint an hour before the meeting, no one would have been able to detect from his behavior that he had been drinking." Although it occurred to him that he might be an alcoholic, he feared he would be fired by Northwest if he sought treatment for his drinking problem. (Pet. App. 4a, 52a-53a) During the course of Northwest's investigation, a representative of the Air Line Pilots Association ("ALPA"), the collective bargaining agent for the Northwest pilots, suggested that the investigation be extended to determine if Morrison was an alcoholic because "[i]t would be a serious mistake. . . to treat it as a straight misconduct case without investigating whether or not there is an underlying medical problem." (Pet. App. 53a) However, the Company declined and instead terminated Morrison.

2. The System Board Award

As required by § 204 of the Railway Labor Act ("RLA"), 45 U.S.C. § 184, the applicable collective bargaining agreement between ALPA and Northwest established a System Board of Adjustment to resolve "disputes between any employee covered by the Pilots' Agreement and the Company growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement." (Pet. App. 9a) ALPA grieved Mr. Morrison's discharge, and in due course the grievance was submitted to the Board, with the issue being whether the discharge was for good cause, and, if not, what the appropriate remedy should be. (Pet. App. 4a, 49a)

The Board, comprised of one member each appointed by ALPA and Northwest and a neutral Chair-

man, heard extensive and unrefuted evidence concerning Mr. Morrison's alcoholism and the prospects for his rehabilitation. With the Northwest member dissenting, the Board found that Morrison was "an untreated alcoholic" when he flew as co-pilot on August 1, 1982, and that his "uncontrolled drinking and subsequent flying under the presumptive influence were medically related to and the result of his affliction." (Pet. App. 66a) The Board further found that Morrison had completed a comprehensive alcohol treatment program, had remained abstinent since, and had been successfully rehabilitated as evidenced by a "consistent pattern of recovery over an extended period of time." (Pet. App. 4a, 56a, 72a) Additionally, the Board determined that on January 10, 1984 the FAA had declared Morrison eligible for "a special issuance" first-class medical certificate which would permit him to pilot commercial aircraft again if ALPA and Northwest would monitor and periodically report on his continued abstinence. (Pet. App. 5a, 56a) The Board further determined that Morrison would be eligible under FAA regulations[3] for unconditional first-class medical certification—that is, without the monitoring and reporting requirements—if and when the clinical evidence, including not less than two years of sustained total abstinence, satisfied the Federal Air Surgeon as to his recovery.[4]

Based "on all the facts and circumstances" before it, the Board concluded that Morrison's discharge was

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[3] 14 C.F.R. § 67.13(d)(1)(i)(c) (1986).

[4] Subsequent to the Board's award, and after more than three years of abstinence, Morrison did receive his unconditional first-class medical certification from the Federal Air Surgeon. (Pet. App. 5a)

without just cause, and that he should be offered reinstatement, without back pay or benefits, if and when the FAA issued him an unrestricted first-class medical certificate. (Pet. App. 4a-5a, 71a-75a) The Board acknowledged that Morrison's misconduct was "serious" and "must weigh heavily against him" (Pet. App. 72a), but that his alcoholism, rehabilitation, and lengthy service were significant countervailing factors. (Pet. App. 66a, 72a-73a) The Board was careful to state that it was not promulgating any general rule "that the Company cannot, under its present policy, terminate rule violators who are found to be alcoholics;" rather, "[t]hose alcoholics who do not come forward before breaking the rules are still subject, upon a full review of the facts and their medical condition, to the severest of consequences, including termination." As the Board emphasized, "[a]ll that is being said here is that on the facts as presented, Morrison's reinstatement, subject to unconditional qualification by the Federal Air Surgeon, is justified," and that "[o]ther facts may dictate other results." (Pet. App. 6a, 74a-75a). As a final point, the Board stated that "[i]nasmuch as the Federal Air Surgeon has the statutory authority to make [medical fitness] determinations and must do so with the highest regard for air safety, . . . the award herein is consistent with public policy and within the Board's authority to make." (Pet. App. 6a, 75a)

3. The District Court's Decision

As the District Court saw the issue before it, there were two strong federal policies involved here: the federal policy of furthering safe air travel and the federal policy of resolving labor differences through arbitration; hence, "the central question . . . is

whether the balance between the two federal policies lies sufficiently in favor of air safety to rule that the arbitrator has exceeded his jurisdiction or 'acted contrary to public policy' in ordering Morrison's reinstatement." (Pet. App. 37a) In the District Court's view, because application of the Company's 24-hour rule to Morrison's situation is "a matter about which the collective bargaining agreement is silent"—that is, it involves only a grievance rather than interpretation of specific contract language—then, "[a]t best, the subject matter of the dispute sits only on the outer perimeter of the arbitrator's jurisdiction." (Pet. App. 38a, 45a) The District Court faulted the Board for denying Northwest the "right" to enforce its own safety rules, even though Northwest's rules on alcohol were not incorporated in the collective bargaining agreement. (Pet. App. 38a-39a) As the Court put it, "[i]f safety rules are listed as a legitimate subject for arbitration under the collective bargaining agreement, or if the rules are clear [*sic,* "unclear"?], judicial review might well not be permissible." (Pet. App. 42a) However, in this case "no specific agreement was reached to submit safety matters to arbitration," and, therefore, "the arbitration Board has exceeded its jurisdiction not because the Company retains *exclusive* jurisdiction over safety matters under the FAA, but because the Board's decision substantially interferes with air safety responsibilities entrusted to Northwest without encroaching unduly on concerns underlying federal arbitration policy." (Pet. App. 39a, 42a-43a)

The District Court also concluded that "the Board's interference with Northwest's enforcement of its 24-hour rule was [not] entirely consistent with public policy." (Pet. App. 44a) The Court reasoned that

"[t]he public policy against the use of alcohol and flying is 'well-defined and dominant,' " and "that national policy . . . incorporates both the concept of deterrence (through rehabilitation and reinstatement), and that of incapacitation (dismissal for violation of a 24- or 8-hour rule)." (Pet. App. 43a, 44a)

4. The Decision of the Court of Appeals

The Court of Appeals reversed. Citing the RLA provision which makes system board awards "final and binding" (RLA § 3, First (m), 45 U.S.C. § 153, First (m) (1982)) and the emphatic comment in *Union Pacific R.R. v. Sheehan,* 439 U.S. 89, 93 (1978) that "this statutory language means just what it says," the Court addressed the issue of "whether the Board's decision falls within the scope of its jurisdiction." (Pet. App. 8a) The Court found it "absolutely clear" from the "explicit terms" of the ALPA/Northwest collective bargaining agreement "that an unresolved grievance claiming the absence of 'just cause' with respect to a disciplinary action taken against a pilot is a 'dispute' within the jurisdiction of the Board." (Pet. App. 9a) Indeed, "[t]here is *nothing* in the parties' agreement that even suggests that a disciplinary action related to an alleged breach of a safety rule is excluded from arbitral review," nor is there any "conceivable way to construe the parties' agreement as removing from the Board's jurisdiction disciplinary actions related to alleged breaches of the twenty-four hour rule." (Pet. App. 10a) Moreover, "in reviewing the grievance, it is equally plain that the Board was authorized to judge the legitimacy of the disciplinary penalty imposed in the light of mitigating circumstances . . . because '(a)rbitral determination . . . of the fitness of the punishment is routinely grist for

the arbitral mill,' " citing *Gulf States Tel. Co. v. Local 1692, Int'l Bhd. of Elec. Workers,* 416 F.2d 198, 202 n. 10 (5th Cir. 1969). (Pet. App. 9a)

The appellate court rejected as totally unsupported "the District Court's imposition of a presumption against arbitration of safety issues." (Pet. App. 10a) It held instead that the "fact that the arbitration touches on issues related to airline safety is irrelevant." In short, the Court said, "[i]n all critical respects, . . . this case involves a straightforward application of well-established law concerning the *limited* role of the courts in reviewing labor arbitration awards . . ." (Pet. App. 9a, 11a)

The Court of Appeals likewise characterized as "meritless" Northwest's contention "that the Board's decision is somehow contrary to public policy." (Pet. App. 12a). Drawing the controlling principles from *W.R. Grace & Co. v. Local Union 759, Int'l Union, United Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757, 766 (1983) and its own recent decision in *American Postal Workers Union v. United States Postal Service,* 789 F.2d 1, 8 (D.C. Cir. 1986)—*i.e.*, that the public policy exception to enforcement of arbitration awards "applies only when the public policy emanates from clear statutory or case law, '*not from general considerations of supposed public interests*' "—the Court saw nothing "unlawful" either in the Board's "determination that Morrison's alcoholism was an illness that could not support a finding of 'just cause' for dismissal in this case" or in the "policy of allowing reformed alcoholics to fly as pilots . . ." (Pet. App. 12a-13a) Especially significant in the Court's view is that the "Board's decision merely required Northwest to reinstate Morrison if and when

he was recertified by the FAA as fully fit and licensed to fly." (Pet. App. 13a) For, as the Court put it, "[t]o suggest that the Board's award violates public policy is to contend that the FAA was derelict in its responsibilities in considering Morrison for recertification. . . .It would be the height of judicial chutzpah for us to second-guess the present judgment of the FAA recertifying Morrison for flight duty." (Pet. App. 13a) In any event, the Court noted, "this is not a situation in which the Board has permitted a drunkard to pilot an aircraft, nor did it treat lightly the fact that Morrison had flown an aircraft while under the influence of alcohol." Instead, the "Board carefully considered all safety issues and applied stringent prerequisites to allowing Morrison to fly again. (Pet. App. 14a, n. 33)

ARGUMENT

The Court of Appeals correctly evaluated this case as one which involves nothing more than "a straightforward application of well established law" to judicial review of Railway Labor Act system board awards. The appellate court was equally correct in its application of those principles to the particular facts and circumstances of the case. Hence, the decision does not warrant any further review by this Court.

I. THE SYSTEM BOARD HAD JURISDICTION TO DETERMINE WHETHER THERE WAS JUST CAUSE FOR MORRISON'S DISCHARGE AND, IF NOT, WHAT SHOULD BE THE APPROPRIATE PENALTY

It is well settled that a labor arbitration award which "draws its essence from the collective bargaining agreement" must be enforced. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597

(1960). The judicial role "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract," and "[t]he courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960). Moreover, "[i]n the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *AT&T Technologies, Inc. v. Communications Workers*, ___ U.S. ,___, 106 S. Ct. 1415, 1419 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 584-85 (1960).

The RLA establishes a "mandatory, exclusive and comprehensive" scheme of grievance arbitration in the airline industry by requiring that "disputes between an employee. . . and a carrier. . . growing out of grievances. . ." be submitted to System Boards of Adjustment for "final and binding" resolution. 45 U.S.C. §§ 153 First (m), 184; *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963): *accord, Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978). The range of judicial review of System Board awards is "amongst the narrowest known to law" (*Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970)), for the RLA explicitly limits such judicial review "to three specific grounds: (1) failure of the. . . Board to comply with the requirements of the. . . Act; (2) failure of the . . . Board to conform, or confine, itself to matters within

the scope of its jurisdiction; and (3) fraud or corruption. 45 U.S.C. 153 First (q)." *Sheehan,* supra, 439 U.S. at 93.

Northwest argues that "this case presents the important, unresolved and recurring question of the interplay between an air carrier's safety obligations under the Federal Aviation Act and the mandatory arbitration of grievances under the Railway Labor Act." (Pet. 19) Contrary to Northwest, if there are any legitimate questions concerning the interplay between the two Acts, none are presented by this case. If anything, the case offers a textbook example of intelligent accommodation: the System Board set aside Morrison's discharge and awarded him reinstatement (without any back pay), but only if and when the FAA, which has a statutory duty to "assure safety in air commerce" (49 U.S.C. § 1422(b)(1)), issues him an unrestricted medical certification.

Northwest suggests that System Board jurisdiction in this case is undercut by 49 U.S.C. § 1421(b), which provides that "[i]n prescribing standards, rules, and regulations, and in issuing certificates. . ., the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest. . ." This provision recognizes that there is an implicit duty on air carriers—as, indeed, there is on all other enterprises—to conduct their business in a manner commensurate with the safety risks involved. It is precisely because safety is such a major concern in air travel that the Federal Aviation Act mandates close government oversight, directs the Secretary in 49 U.S.C. § 1421(b) to ensure that carriers comply with their safety responsibilities,

and gives him broad authority (49 U.S.C. §§ 1421-1441) to see that they do so. The implication is not, as Northwest would have it, that the Federal Aviation Act creates a safety related exception to the normal jurisdiction of RLA System Boards; it is rather that safety is too important a matter to be entrusted to the airlines alone. Moreover, the Federal Aviation Act elsewhere makes clear that its provisions are not intended to undermine the RLA's statutory procedures: 49 U.S.C. § 1371(k)(3) expressly states that "[n]othing herein contained shall be construed as restricting the right of any. . . pilots or co-pilots, or other employees, of any. . . air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions." It is not consistent with § 1371(k)(3) to rely on the Federal Aviation Act to deprive a pilot discharged for a safety violation—even a serious one—of his right under a collective bargaining agreement and the RLA to have a System Board determine whether there is "just cause" for his discharge. If the law were otherwise—that is, if carriers had discretion unfettered by System Board review to mete out discipline for alleged or actual safety infractions—then in an industry like air transportation, and particularly for pilots, a key aspect of the Railway Labor Act would largely be nullified.

In view of the foregoing, it is scarcely surprising that a number of court decisions have upheld System Board awards which conflicted with carriers' safety determinations. *E.g, Gunther v. San Diego & Arizona Eastern Railway,* 382 U.S. 257, 262-264 (1965) (train engineer's health and physical ability to operate an engine); *ALPA v. Eastern Air Lines,* 632 F.2d 1321 (5th Cir. 1980) (Board overturned discharge of pilot

who had failed to satisfy proficiency requirements); *Hart v. Overseas National Airways,* 94 LRRM 3133 (E.D. PA, No. 73-2448, Feb. 17, 1977) (Board rejected carrier's determination on critical safety matter); *ALPA v. Capitol Airways,* 83 LRRM 2169 (S.D. N.Y., No. 72 Civ. 3015, Apr. 2, 1973) (Board overruled carrier's determination regarding upgrade to Captain). Indeed, in *Northwest Airlines, Inc. v. ALPA,* 373 F.2d 136 (8th Cir. 1967), *cert. denied,* 389 U.S. 827 (1967)—a case which also involved the discharge of pilots for violating Northwest's rules governing the use of alcoholic beverages—the Eighth Circuit explicitly sustained the trial court's determination that a System Board's award of reinstatement must be accorded finality.

Moreover, this Court's decision in *Western Air Lines v. Criswell,* 472 U.S. 400 (1985) further refutes the novel contention that a System Board lacks jurisdiction to overrule an airline's decision on employee discipline where safety is implicated. *Criswell* fully recognized and specifically took note of the public interest in safety and the special need "to err on the side of caution" in air transportation. 472 U.S. at 419-420. Nonetheless, the Court concluded that a jury of lay persons could appropriately evaluate a carrier's contention that implementation of a particular safety policy—in that case, a rule requiring flight engineers to retire at age 60—is "reasonably necessary" to the safe operation of its business. It would be incongruous to permit a jury to make that evaluation, and yet to hold that a System Board lacks jurisdiction under the RLA to evaluate a carrier's contention that nothing less than the discharge of a pilot will suffice to satisfy legitimate air safety concerns.

Northwest argues that the holding here conflicts with that of the Ninth Circuit in *World Airways, Inc. v. International Brotherhood of Teamsters,* 578 F.2d 800 (9th Cir. 1978). (Pet. 20-21) In *World,* an arbitrator directed that a pilot who had been demoted for undisputed "judgmental deficiencies" be offered retraining and an opportunity to requalify as Pilot-in-Command. The district court, however, specifically found that these "judgmental deficiencies" rendered the pilot unfit to serve as Pilot-in-Command, and could not be cured through retraining. The appellate court determined that the lower court's findings were fully warranted by the record (578 F.2d at 802). *World Airways* will not support the expansive reading Northwest seeks to give it in order to demonstrate a conflict. In *Association of Professional Flight Attendants v. American Airlines, Inc.*, 767 F.2d 1331 (9th Cir. 1985), the carrier, relying on *World Airways,* asserted "that because beards raise safety concerns, the issue of whether flight attendants should be allowed to wear beards is not subject to arbitration." 767 F.2d at 1334. Not only did the Ninth Circuit reject that contention, it also made clear that a "less intrusive remedy" than complete reinstatement to Pilot-in-Command "might well have fared differently" in *World Airways. Ibid.* In other words, it was not that the arbitrator generally lacked jurisdiction over the carrier's determination in *World Airways,* but rather that he lacked jurisdiction to order a remedy which, so far as appears, did not involve the FAA and which the court specifically found endangered public safety because of the pilot's unremediable deficiencies. *World Airways* is thus factually distinguishable from this case in which the System Board

awarded Morrison reinstatement only if and when the FAA deems him fully safe to return to flight duty.

II. THE REFUSAL OF THE COURT OF APPEALS TO FIND A PUBLIC POLICY EXCEPTION TO ENFORCEMENT OF THE BOARD'S AWARD IS WELL GROUNDED IN THIS COURT'S DECISION IN *W.R. GRACE*

As this Court plainly stated in *W.R. Grace & Co. v. Local Union 759, Int'l Union, United Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757, 766 (1983), an arbitration award may not be set aside based on "general considerations of supposed public interest." To be deemed judicially unenforceable, the award must be violative of "some explicit public policy" which "must be well defined and dominant, and is to be ascertained by 'reference to the laws and legal precedents. . .' "

Obviously, there is a "well defined and dominant" public policy based on safety considerations that pilots should not fly when intoxicated. But neither the policy itself nor its effective administration precludes from reinstatement a pilot who, although he flew while "under the influence," was suffering from alcoholism, a medically recognized condition characterized by compulsive out-of-control drinking; who, according to the uncontroverted evidence, subsequently has been successfully treated for alcoholism and rehabilitated; and who is now entitled to reinstatement only because the appropriate federal officials—*i.e,* those charged by law with issuing airman certificates in a manner "necessary to assure safety in air commerce" (49 U.S.C. § 1421(b))—unconditionally recertified him based on satisfactory evidence that he had been abstinent for more than three years.

Northwest asserts that "those involved in public transportation who drink and jeopardize safety are unworthy of the public trust." (Pet. 12-13) A generalization of this nature, however, simply does not translate into a concrete public policy that such individuals may never be reinstated to their former positions and presumably must forever be barred from obtaining any similar positions with other carriers. To be sure, common sense dictates that they not be permitted to return to duty without due regard for safety. And the cases cited by Northwest (Pet. 14 n.5) stand for just that limited proposition. For instance, in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), an appellate court refused to enforce an arbitration award reinstating a truck driver who admitted to drinking shortly before he overturned his eighteen wheel rig on the highway. In that case, though, the court was confronted with an arbitration decision which returned the driver to his prior duties without any meaningful rationale for doing so and especially without much assurance he would not drink and drive again (712 F.2d at 124). But that is a far cry from this case, in which the safety concerns have been fairly addressed by both the System Board and the Court of Appeals (*supra*, pp. 5, 8-9). Once those concerns have been satisfied, as they have here, there is little logic to insisting that public policy demands continued denial of the opportunity to fly again. Northwest cites no precedent, nor have we discovered any, for invoking the public policy exception in a situation even remotely comparable to that of Mr. Morrison—that is, in which the award ordering reinstatement recognized the serious nature of the misconduct, but also took into account subsequent re-

habilitation, continued abstinence over an extended period, and unconditional recertification by the FAA.

Northwest complains that the award treats voluntary intoxication as a defense to wrongful conduct, and is thus at odds with civil and criminal law. (Pet. 14) The complaint is without substance. As shown *supra*, p. 5, the Board went out of its way to make clear that it did not consider alcoholism a defense and that its decision should not be taken to mean that Northwest could not "terminate rule violators who are found to be alcoholics." What it said, instead, is that "alcoholism is an illness and that, as another Board said in. . . [a prior case involving ALPA and Northwest], 'the possibility of recovery from an illness is an element which should be considered in determining the appropriate remedy.' " (Pet. App. 55a, 69a) Northwest offers no persuasive showing that the latter position is in any way inconsistent with established public policy within the meaning of *W.R. Grace*. On the contrary, as the Board itself observed, "if the public policy of a regulatory agency be the guide, the FAA's public policy is to recognize alcoholism as a treatable disease and to encourage treatment and an early return to productive employment." (Pet. App. 68a)[5]

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[5] Expert medical witnesses testifying before the Board accepted as valid the FAA's definition of alcoholism, as contained in an FAA notice dated November 10, 1976, titled *Alcoholism And Airline Flight Crewmembers*, which was introduced as an exhibit at the hearing. That definition reads: "Alcoholism. . . is a diagnosable disease in those whose alcohol intake is great enough to damage physical health, or personal or social functioning (which includes occupational functioning,), or when it has become a prerequisite to normal functioning." (Pet. App. 56a-

Finally, Northwest contends that public policy embodied in the Federal Aviation Act gives it independent authority "to assure air safety by employing only pilots that Northwest believes have the character and judgment necessary to protect the safety of its passengers." (Pet. 17) Undoubtedly Northwest does have a responsibility to employ competent pilots. But, as shown *supra*, pp. 11-13, that does not mean it is the sole judge of pilot qualifications and can terminate employees at will without regard to the grievance/arbitration provisions of the RLA. If Northwest could discharge pilots for lack of proper character or judgment without having to objectively justify its assessment before a System Board, then RLA and contractual protections would, indeed, be illusory.

We submit the public policy issue raised by Northwest can best be placed in perspective in light of the question asked by Judge Edwards during oral argument at the appellate level: could Northwest and ALPA have entered into a collective bargaining agreement which provided that a pilot who was guilty of job-related misconduct attributable to alcoholism would be reinstated after completion of a high quality treatment program, recovery as indicated by at least two years of continuous abstinence, and unconditional recertification by the FAA? If the answer is "yes", as it clearly should be, then it cannot be against public policy for a System Board to make that determination

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57a). *See also*, The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. § 290dd-1.(b)(1), which provides, in pertinent part, that "[n]o person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the grounds of prior alcohol abuse or prior alcoholism."

when the contract itself is silent on the "just cause" issue. As the Court of Appeals pointed out, if Northwest is uncomfortable with that result, it "is free to negotiate with ALPA to remove the application of safety rules from the jurisdiction of the Board or to reduce the amount of discretion given to the Board on such matters." (Pet. App. 14a)

III. THE GRANT OF CERTIORARI IN *MISCO* IS NOT ADEQUATE REASON TO GRANT CERTIORARI IN THIS CASE

Northwest urges that this case be heard in tandem with *Misco, Inc. v. United Paperworkers Int'l Union*, 768 F.2d 739 (5th Cir. 1985), *cert. granted*, ___ U.S. ___, 107 S. Ct. 871 (Jan. 12, 1987, No. 86-651). (Pet. 8-10) In *Misco*, the employer discharged an employee for violating a company rule against possession of marijuana on company property. An arbitrator reinstated the employee with full back pay and seniority because he found the evidence did not establish the employee had violated the rule. The Fifth Circuit, affirming a district court's refusal to enforce the award, evaluated the evidence itself and concluded that the employee was, indeed, a rule-violator and that his dismissal was therefore justified on public policy grounds. There are three reasons why this case is different from *Misco*, and, accordingly why the grant of certiorari in *Misco* does not warrant granting certiorari in this case or holding it in abeyance pending a decision in *Misco*.

First, for the reasons set forth by Judge Tate in his dissent (768 F.2d at 743-746), the decision in *Misco* violates "settled principles by which judicial review of arbitration awards is 'sharply circumscribed.'" Specifically, Judge Tate found inconsistent with the

Steelworkers' Trilogy[6] the majority's reevaluation of "(a) the arbitrator's factual evaluation of the evidence as not proving that Cooper possessed or used marijuana on the plant premises, (b) the arbitrator's interpretation of the contractual provision as not providing grounds for discharge if Cooper was in a vehicle where someone else was smoking marijuana, or (c) the arbitrator's procedural ruling that evidence unknown to the employer at the time of his discharge. . . was not probative of the issue before the arbitrator. . ." (768 F.2d at 744). By contrast, the Court of Appeals in the instant case followed the principles laid down in the *Trilogy* cases, and enforced the System Board award; hence, there is no reason for this Court to review the decision here.

Second, in *Misco,* having made its own finding that the employee had brought marijuana on to the employer's premises, the Court had no assurances that he would not do so again if he were reinstated. As the majority thus saw the issue, the employer could not adequately protect the safety of the workplace and of other employees if a confirmed drug user were permitted to return to his job, which involved operating dangerous machinery (768 F.2d 742-743). In the Court's view, public policy precluded such a result. But the majority opinion provides scant basis for believing that the outcome would have been the same in the totally different context of the case at bar: *i.e,* a detailed and well reasoned System Board opinion in which the Board did not minimize the seriousness

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[6] *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navig. Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960).

of the misconduct and "carefully considered all safety issues and applied stringent prerequisites to allowing Morrison to fly again." (Pet. App. 14a n.33) In short, the public policy considerations which led the Fifth Circuit to intervene in *Misco* are simply not present here.

Third, in *Misco* there was no governmental agency assigned to determine whether the employee's reinstatement was consistent with the public interest. Here, of course, Morrison's reinstatement was explicitly made contingent on his unconditional recertification by the FAA. Unlike *Misco,* in which a far broader public policy issue is present, this case presents only the narrow issue of whether a court is compelled "under the guise of 'public policy,' to reverse an arbitration award that is expressly limited by deference to the ultimate judgment of the agency that is charged with the enforcement of the public policy here at issue." (Pet. App. 13a)

CONCLUSION

For the reasons set forth above, the Air Line Pilots Association requests that the petition for certiorari be denied.

Respectfully Submitted,

EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION, INT'L.
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119
Counsel for Air Line Pilots Association

**Counsel of Record*

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